No. 11591

United States
Circuit Court of Appeals
For the Ninth Circuit

FRED GERARD and ROSE GERARD,

Appellants

vs.

UNITED STATES OF AMERICA, J. L. SHERBURNE and EULA SHERBURNE, husband and wife, G. S. FRARY and BESSIE L. FRARY, his wife, W. H. MERCER and GEMMA N. MERCER, his wife, MILTON MERCER and CARMA MERCER, his wife, GUY McCONAHA and IDA McCONAHA, his wife, and FRED SHUPE,

Appellees

BRIEF OF RESPONDENTS
J. L. SHERBURNE and EULA SHERBURNE

Murriils and Frisbee
Cut Bank, Montana
Attorneys for Respondents

Upon Appeal From the District Court of the United States for the District of Montana

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STATEMENT OF THE CASE

The complaint alleges that allotments were made and trust patents issued to each of the appellants, in the usual form, pursuant to an agreement of 1887 and the General allotment act of 1887;

That the trust period was indefinitely extended by the Wheeler-Howard act, in 1934, Paragraphs I to V.

In paragraph VI, appellants allege that fee patents were issued in direct violation of the Agreement of 1887, and the general allotment act of 1887, and the trust clause of the restricted patent without the application or consent of the plaintiffs. The same paragraph contains the following significant allegation:

> "That by reason of the agreement of 1887 heretofore cited and the General Allotment Act of 1887, plaintiffs acquired a vested right of which they could not be deprived, directly or indirectly, by their own voluntary acts or by operation of law, whether by tax deed, voluntary conveyance or otherwise."

Paragraph VII of the complaint contains the following allegation:

> "That the right of restriction on alienation was and is vested right that could not be divested by subsequent act of Congress or by issuance of a fee simple patent which did not contain notice of the restriction on alienation provisions of the Agreement of 1887, and the General Allotment Act of February 8, 1887, both of which are cited herein."

Paragraph VIII alleges that tax deeds were issued to both allotments by Glacier County and that the County conveyed after sale of the tax title to W. R.

McDonald; that the taxes and tax deed are null and void and the land immune to taxation.

The complaint alleges in Paragraph IX that the Secretary of the Interior never made any finding that the appellants were competent to receive a fee patent, and that any voluntary conveyances of the land by the appellants are null and void because made without the approval of the president of the United States, or the Secretary of the Interior, and in violation of the restriction on alienation.

Paragraph X of the complant alleges the novel theory that the familiar habendum clause of the fee patent preserves the restrictions upon taxation and alienation contained in the trust or restricted patent.

Paragraph VII alleges that the plaintiffs are the owners of the land; paragraph XI alleges that the United States may lawfully claim an interest in the lands as guardian of the plaintiffs. Paragraph XI also alleges that the other defendants claim an interest in the land without right.

The Prayer of the Complaint prays for judgment of the court that, the defendants save the United States have no interest; that the fee patents were issued without application or consent; that the lands are inalienable and immune from taxation; and that the plaintiffs are the owners of the lands subject to the guardianship of the United States.

Defendants moved to dismiss the complaint, upon the grounds that no cause of action was stated, that the United States was not subject to suit, and was an indispensable party, and that there was a misjoinder of cause of action. The court dismissed

the action without ruling upon the question of misjoinder of actions.

ARGUMENT

The theory of this brief is first, that the complaint does not state a cause of action, second, that this action is an attack upon a fee simple patent issued by the United States and such an action can only be maintained by the United States as plaintiff, and can not be prosecuted by any person or citizen in his own right, the United States is an indispensable party to this action, and it has not consented to be sued.

I.

The complaint does not state a cause of action, because it admits that the plaintiffs have made voluntary conveyances of their lands, after the fee simple patents were issued, and does not allege sufficient facts to establish that the fee simple patents were issued contrary to law or are null and void for any other reason.

The complaint alleges that tax deeds upon both allotments were issued to Glacier County, and that the County sold the tax title lands to W. R. McDonald. The Statement of the case by plaintiffs contains the same thing. It is true that the complaint mentions voluntary conveyances by the plaintiffs, however, the appellants brief says very little about the voluntary conveyances, but a great deal about the tax deeds. The brief of appellants must be designed to infer that the defendants claim title under the tax deed and that the plaintiffs have been divest-

ed of their title and possession by virtue of the tax deed. The voluntary conveyances are nowhere described or explained.

The allegations that tax deeds were issued for both allotments is not true. Glacier County assigned the tax sale certificates for the Fred Gerard allotment to W. R. McDonald, and a tax deed was issued to McDonald. The taxes were paid upon the Rose Gerard allotment and no tax deed was ever issued against that land.

Plaintiffs lost both allotments by foreclosure of a mortgage made to one Noel. Partial assignments of the sheriff's certificate of sale were made so that the Sheriff's deed to the Fred Gerard allotment was issued to defendant . L. Sherburne, and for the Rose Gerard allotment to the defendant, G. S. Frary.

The Fred Gerard allotment is upland grazing land with no water upon it. The Rose Gerard allotment is located upon the Middle Fork of Milk River a mile or so north of Fred Gerard's allotment. The family made no attempt to save Fred Gerard's allotment. Defendants, Guy McConaha and Fred Shupe, succeeded to both the tax title and mortgage foreclosure titles of the Fred Gerard allotment.

The buildings are located upon the Rose Gerard allotment. A daughter of the plaintiffs, Mary Gerard Allison, purchased her mother's allotment from G. S. Frary and gave a mortgage for the consideration. She defaulted and Frary foreclosed and the land was sold a second time by the sheriff. Mary Gerard Allison redeemed, and subsequently sold the

land to Earl Johnson who in turn sold the land to defendants W. H. and Milton Mercer.

The action is based upon the decisions of this court in United States vs. Glacier County, 99 Fed. 2nd 733; United States vs. Benewah County 290 Fed. 628; United States vs. Lewis County, Idaho, 95 Fed. 2nd 232; and United States vs. Nez Perce County 95 Fed. 2nd 237.

If the question of voluntary conveyances is lost sight of, it will appear that this action is exactly like the above actions except for the difference in the party plaintiff and the situation of the United States. The plaintiffs clearly rely upon these citations to establish that the tax deeds are void, but since they lost title to both allotments by voluntary conveyance as well as by ax deed upon one allotment, it must be true that the plaintiffs rely upon the cited decisions of this court to establish not only that the ax deed is void, but that their voluntary conveyances are void. A mortgage is of course a voluntary conveyance, and a subsequent foreclosure does not make it involuntary.

The complaint alleges that the fee simple patents were issued without application or consent by the appellants. If these allegations are true and are established as questions of fact, there is little question that the tax deed is void, under the above cited decisions of this court, and Choate vs. Trapp, 224 U. S. 665; 32 S. Ct. 565, 56 L. Ed. 941.

However, we think the complaint wholly fails to state any cause of action for cancellation of the voluntary deeds and mortgages made by the appellants.

The Benewah County decision and the subsequent decisions of this court all were actions to vacate tax deeds; no question of cancellation of voluntary conveyances made by Indians was involved. The counsel for appellants is proceeding upon the theory that if a fee simple patent is null and void if issued without the application or consent of the Indian, then the subsequent deeds and mortgages by the Indian are likewise null and void.

It is true that counsel argues that the habendum clause of the fee patent preserves the restrictions against taxation and alienation found in the trust patent, but this argument is only an alternative one and is not his principal theory. The argument that the habendum clause of the fee patent preserves the restrictions contained in the trust patent because otherwise, it must be issued in violation of law (see pages 15 and 16 of appellants brief) is to puerile to deserve serious consideration.

The fee simple patent did not convey any right, title or interest upon the appellants that they did not already possess, under the trust patents, except the freedom to alienate. Appellants were the beneficial and actual owners of the land under the trust patents; the only new right conferred by the fee patents was the right to alienate. If the fee simple patent does not terminate the restriction against alienation, then it does not have any legal significance or effect at all.

The appellants can not prevail in a trial upon the merits in this action, unless they can vacate not only the tax deed upon Fred Gerard's allotment, but the voluntary deeds and mortgages made by both appel-

lants as well. This necessity is the significance of the statement at page 14 of the brief, that the restriction upon alienation is a vested right, running with the land, of which the appellants can not be deprived.

The proposition that restriction against taxation is a vested right of which an Indian can not be deprived without his application or consent is so well established, that it is no longer open to debate. We know of no decision of any court which refers to the restriction against alienation as a vested right; neither do we know of any court decision which refers to the right to alienate, once granted, as a vested right. None the less, Counsel for appellant following his own brand of logic has taken the language of this court that restriction against taxation is a vested right in the Benewah County case, and developed the conclusion that the restriction against alienation is also a vested right and that voluntary deeds and mortgages are contrary to law and just as null and void as taxes and tax deeds.

We do not know of any court decision where the validity of voluntary conveyances by Indians has been questioned upon the ground that the fee simple patent was issued without the application or consent of the Indian. Counsel for appellant has not referred to any in his brief save, United States vs. Glacier County, supra.

United States vs. Glacier County was file No. 8734 in this court. Reference to the printed transcript for that appeal, page 21, shows that the defendant, Glacier County, alleged in its answer that one Indian, namely Alice Aubrey Martin Whister,

had made a mortgage and an oil and gas lease on her allotment, after the fee patent was issued, Paragraph XIII part 2 of answer. The United States moved to strike such allegation, and the trial court granted the motion, see pages 23, 24 and 83 of transcript 8734.

At the trial of U. S. vs. Glacier County the attorneys for the United States and for the county stipulated that all of the 28 fee simple patents involved in the action had been issued to the respective Indian allottees, without their application or consent, see page 62 of that transcript.

The counsel for appellants says at page 22 of his brief, that the trial Judge, (Judge Pray) said in his opinion that the Whister lands rested upon the same state of facts and same vested rights as were found to exist in respect to the other lands. Judge Pray did make such a remark, see page 28 of the Glacier County transcript.

However, this court in its opinion did not make any such remark. This court based its decision upon the stipulation that the patents were issued without application or consent by the Indians. In the face of the stipulation there was no reason for the court to consider whether the mortgage and oil and gas lease made by Alice Aubrey Martin Whistler was or was not evidence of consent that the patent was issued with her consent; neither was there any reason for Judge Pray to consider that the Whistler lands would be treated any differently than the rest.

The owners of the mortgage and oil and gas lease made by Mrs. Whister were not parties defendant in the action and both mortgage and lease had prob-

ably expired when the action was commenced against Glacier County. The only defendants who contested the former action were Glacier County and its assessor and treasurer. The parties interested in the mortgage and oil lease were not before the court. The appearing defendants stipulated that the patent was issued without the application or consent of Mrs. Whistler. Glacier County was not concerned about the validity of the mortgage or oil lease or even the fee patent, but only about the taxes and tax deeds. All except Mrs. Whistler's patent were cancelled by order of the Secretary of the Interior.

We therefore, submit, that United States vs. Glacier County is not authority for the proposition advanced by appellant's counsel, namely that, if a fee patent be issued without application or consent by an Indian, that the Indian's subsequent voluntary deeds and mortgages are null and void. No such proposition has ever been decided by any court. The present action is not exactly like the Glacier County case, as opposing counsel would have the court believe, because it involves questions about the validity of voluntary conveyances by Indians which were not adjudicated in that decision.

Counsel for appellants has based its appeal upon his theory that the restrictions against taxation and alienation are both vested rights of which the Indian allottee can not be deprived without his consent. The Counsel treats both restrictions as though they were one and the same thing, when in fact the two restrictions are very different. The restriction

against taxation can continue to exist long after the restriction against alienation has been removed. The Supreme Court so held in the leading case of Choate vs. Trapp, supra.

> "But the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation. The defendant's argument also ignores the fact that, in this case, though the land could be sold after five years, it might remain nontaxable for sixteen years longer, if the Indian retained title during that length of time. Restrictions on alienation were removed by lapse of time. He could sell part after one year, a part after three years, and all except homestead after five years. The period of exemption was not coincident with this five-year limitation. On the contrary, the privilege of nontaxability might last for twenty-one years, thus recognizing that the two subjects related to different periods and that neither was dependent on the other. The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon Oklahoma. Kansas Indians (Blue Jacket vs. Johnson County) 5 Wall. 737 (1), 756, 18 L. ed. 667, 672; United States v. Rickert, 188 U. S. 432, 47 L. ed. 532, 23 Sup. Ct. Rep. 478." Choate vs. Trapp, 32 S. Ct. 568.

Choate vs. Trapp held that the removal of restrictions against alienation in the case of the Okla-

homa Indians was valid, but that the restrictions against taxation was not thereby removed so long as the Indians held the land. If the fee simple patents were issued to the plaintiffs without their application or consent, they could have held their land for twenty-five years, immune from taxation. However, they did not hold it and have admitted that they made voluntary alienations.

The restrictions against taxation can not be removed without the application or consent of the Indian but it is otherwise with the restriction against alienation. We have pointed out that no court has treated the restriction against or the freedom to alienate as a vested right in any decision so far made. However, the Supreme Court of the United States has several times held that the restrictions against alienation can be removed by Congress with or without the consent of the Indians; the conclusion follows therefore, that the restriction against alienation is not a vested right. The application or consent of the plaintiffs with respect to the issue of the fee simple patent has nothing whatever to do with the validity of the voluntary alienations made by the plaintiffs. It is absurd to argue that the consent of the plaintiffs was necessary in order to make a valid alienation of their lands, for such consent was given when they made the alienation. The consent that is necessary to alienation of allotted lands by Indians is the consent of the Congress of the United States. The Act of Congress, 25 U. S. C. A. 349, which authorized the issuance of the fee patent, and the subsequent issuance of the same by the proper officers of the United States, was all the consent that

was necessary for the plaintiffs to alienate their lands.

The decisions of the Supreme Court to the effect that restrictions against alienation can be removed without the application or consent of the Indians are:

Choate vs. Trapp, supra,

Williams vs. ohnson,
239 U. S. 414, 420, 36 S. Ct. 150,
60 L. ed. 358

Egan vs. McDonald,
246 U. S. 227, 229, 38 S. Ct. 223,
63 L. ed. 680

Jones vs. Prairie Oil & Gas Company,
273 U. S. 195, 47 S. Ct. 338,
71 L. Ed. 602,

Fink vs. County Commissioners,
248 U. S. 399, 404, 39 S. Ct. 128,
63 L. Ed. 324,

Mahnomen County, Minnesota vs. United States, 319 U. S. 474, 63 S. Ct. 1254,
87 L. Ed. 1527

When the fee simple patents were issued the restriction against the alienation of the land and the trust period were both terminated. The obligation of the United States to convey the land free of incumbrance was satisfied, except to prevent levy of taxes while the immunity from taxation still existed. The plaintiffs were free to alienate their lands and having done so, they can not now be heard to say that they have been deprived of their vested rights.

The plaintiffs have admitted that they made vol-

untary alienations of their allotted lands. The complaint fails to allege sufficient facts, which if true would establish that the voluntary conveyances are void. Therefore the complaint does not state a cause of action.

II.

This Action Is An Attempt To Attack, Cancel And Annul A Fee Simple Patent. Such An Action Can Not Be Maintained Except By The United States As A Party Plaintiff.

The Trial Court held that this action was a direct attack upon the fee simple patents issued to the plaintiffs. We think the trial court was right. The complaint alleges that the fee simple patents are void, because both were issued without the application or consent of the plaintiffs. The prayer of the complaint asks that the court find and adjudge that the patents were issued without application or consent of the plaintiffs, and that the lands are inalienable and immune from taxation. The counsel for appellants at pages 22 and 23 of the brief, says that the action is not an attack upon the fee patents, and that the complaint does not ask for cancellation of the fee patents. We think the prayer of the complaint that it be determined and adjudged that the fee simple patents were issued without application or consent, that the lands are inalienable and immune from taxation is exactly the same thing as a prayer for cancellation of the fee simple patents. If the lands are not alienable, then the fee simple patents are certainly annulled.

Neither of these plaintiffs have any authority to maintain an action in their own names for the purpose of canceling a fee simple patent issued by the

United States. Such an action must be prosecuted by and in the name of the United States as plaintiff, and the suit must be under the direction and control of the Attorney General of the United States. Private persons may not prosecute such actions by making the United States a party defendant. Steel vs. St. Louis Smelting & Refining Co. 106 U. S. 447; 27 L. Ed. 226; 1 S. Ct. 389; Moat vs. Minneapolis Mining and Smelting Co. 68 Mont. 253, 217 Pac. 342; U. S. vs. Throckmorten 98 U. S. 61; 25 L. Ed. 93, 50 C. J. 1114, Section 518.

> "A suit to cancel a patent must be brought by the United States, and unless by virtue of an act of congress, no one but the attorney-general, or someone authorized to use his name, can initiate the proceeding." 50 C. J. 1114.
>
> "We are of the opinion that, unless by virtue of an Act of Congress, no one but the Attorney General, or someone authorized to use his name, can bring a suit to set aside a patent issued by the United States, or a judgment rendered in its courts in which such a patent is founded."
>
> "In the class of cases to which this belongs, however, the practice of the English courts and of the American courts also has been to require the name of the Attorney General, as indorsing the suit, before it will be entertained. The reason of this is obvious, namely: that in so important a matter as impeaching the grants of the Government under its seal, its highest law officer should be consulted, and should give the support of his name and authority to the suit. He should, also have control of it in every stage, so that if at any time during its progress he should become convinced that the proceed-

> ing is not well founded, or is oppressive, he may dismiss the bill." U. S. vs. Throckmorten, 25 L. Ed. 96.

Appellant's counsel has devoted much space to an attempt to prove that the appellants have a right to sue the United States for the purpose of attacking the fee simple patents. Such authorities have nothing to do with the issue of this appeal at all. Appellants can not attack a fee simple patent by joining the United States as a party defendant; the United States must be the party plaintiff.

III.

The United States Has Not Consented To Be Made A Party Defendant In This Action; And Is An Indispensable Party.

Even if the United States is properly a defendant rather than a plaintiff in this action, the suit must fail because the United States has not consented to be sued. This action is one to cancel and annul a fee simple patent issued by the United States government, and therefore the United States is an indispensable party.

The counsel for appellants admits that he commenced a similar action upon behalf of these same plaintiffs as well as other persons, and that the district court dismissed that action before this one was commenced. The decision is reported in 62 Fed. Supp. 28. The United States was not made a party, either Plaintiff or Defendant, in that action. If the counsel was really serious about his argument that the United States is not an indispensable party to this action, then why did he not appeal from the decision in the first action.

The appellants made the United States a party defendant in this action, and now therefore, they should not be heard to say that the United States is not an indispensable party. Appellants acquiesced in the former decision of the district court.

The appellants contend that consent to sue the United States has been granted by act of congress, to-wit 25 U. S. C. A. 345. We think counsel has misconstrued the statute.

This court has held that section 345 has no application to any kind of actions except actions to compel officers of the United States to make an allotment and to issue trust patents in the first instance. U. S. vs. Eastman 118 F. 2nd 421; cert. denied 314 U. S. 635, 86 L. Ed. 510, 62 S. Ct. 68.

> "The trial court thought that leave to sue the United States is found in the act of August 15, 1894, as amended, 25 U.S.C.A. s 345. We are not able to agree. It is plain from the whole statute that Congress intended merely to authorize suits to compel the making of allotments in the first instance. Here the allotments have already been made. Should the view taken below be approved and the scope of the statute thus enlarged by judicial construction the government may find itself plagued with suits of Indians dissatisfied with the administration of their individual holdings. Enlargement of the right to sue the government for the redress of grievances of this character is solely a function of Congress. The suit as against the United States should have been dismissed." 118 Fed. 2nd 423.

The Supreme Court of the United States held that the statute authorized suits by the Mission Indians of the Palm Springs Reservation in California

to maintain a suit by Indians against the United States to compel the Secretary of the Interior to issue a trust patent to an Indian. Arenas vs. U. S. 322 U. S. 419; 64 S. Ct. 1090. Further proceedings in the same action again came before the courts in Arenas vs. U. S. 60 Fed. Sup. 411 and 158 Fed. 2nd 730.

The appellants claim that the Arenas decision overrules the Eastman decision, (Their brief page 16). We think that the two decisions are entirely consistent, and that they can be readily distinguished.

In the Eastman case the Indians sought to enjoin the Secretary of the Interior from enforcing his regulations pertaining to the sale and cutting of timber growing upon the restricted allotted lands of the Indians. The court held that the Allotments had been made to the Indians, that they were not being excluded from the allotments and that the statute in question did not apply.

In the Arenas case, the Secretary had made an allotment, and his subordinate had issued the Indian a certificate. The Indian had been in actual possession of the disputed land for many years and had made improvements worth $15,000. The Supreme Court held that the Statute gave consent to maintain the action against the United States to prove whether or not the Indian was entitled to have a trust patent issued to him.

The appellants contend that section 345 grants permission to sue the United States in either of two situations, first when the Indians have been refused an allotment and second when the Indians have

been excluded from their allotments, and they base their claim on the language of the statute pertaining to exclusion from allotments. The complaint admits that the allotments were made to the appellants and that trust patents were issued to them. The brief admits that the United States and its officers have not and are not excluding the appellants from the lands in question. The brief says that the defendants other than the United States are excluding the appellants from the land. If the United States and its officers have not excluded the appellants from the land, wherein is there any cause of action against the United States? If only the other defendants are excluding the appellants from the lands, then there is no cause of action against the United States, unless it is one to vacate and annul the patent. The argument of appellant's counsel simply leads him around to the inevitable conclusion that this action is a direct attack upon the fee simple patents.

At page 15 of the brief counsel argues that if section 345 can not be construed to give the required consent to sue the United States, that such consent may be implied, and he cites Minnesota vs. United States 305 U. S. 382, 83 L. Ed. 235, 59 S. Ct. 292, and United States vs. Hellard 322 U. S. 363, 64 S. Ct. 985.

These two decisions hold that where an act of Congress has granted a right to maintain an action with respect to restricted Indian lands, of which the United States is the fee owner, without expressly granting consent to make the United States a defendant, that such consent may be implied. In the Min-

nesota case a statute granted Minnesota the right to condemn restricted Indian lands for the purpose of establishing highways across such lands. The Court held that consent to sue the United States would be implied from the particular statute even though the consent was not expressly given. In the Hellard case, an act of congress has provided that actions to partition trust patented and restricted lands of deceased Indians could be maintained in the State Courts of Oklahoma. The court held that since the United States was the fee owner of the lands, it was a necessary party to such partition proceedings, and that consent to sue the United States in the State Courts would be implied from the Act.

Appellants contend that their rights are based upon an agreement with the Blackfeet tribe made in 1887 and the General Allotment Act of 1887, and that consent to sue the United States to enforce such rights should be implied. The only relief which appellants seek from the United States is the emasculation of the fee patents, what we contend is cancellation of the fee patent.

Counsel gives no citation for this agreement of 1887. The Citation is Act of Congress of May 1, 1888, 25 Stat. at Large 113, Volume I Kappler on Indian Laws, page 261. In 1887 all of the land in Montana situated south of the Alberta border, north of the Missouri and Marias Rivers and Birch Creek, west of the Dakota border, and east of the Continental Divide of the Rocky Mountains was one vast Indian Reservation. The Act of May 1, 1888 ratified agreements made the year before with Indians located at the Fort Peck, Fort Belknap and

Blackfeet Agencies, whereby these three Indian Reservations were established with approximately their present boundaries and the Indians relinquished the remainder of the land. The same Act provided that if any Indian families had established homes and improvements upon land without the new reservation boundaries, that such Indians might have the land allotted to them, and receive a trust patent containing the terms of the allotment act of 1887. The plain terms of this act show that it has nothing whatever to do with allotments made within the boundaries of the new reservations, and the lands in question are within not without the new reservation. Both the agreement of 1887 and the Act of May 1, 1888, expressly forbade allotments in severalty among the Blackfeet.

The act of March 3, 1871, Revised statutes 2079, 25 U.S.C.A. 71, provides that no agreement or treaty shall be made with any Indian tribe upon the theory that such tribes are independent nations. Since 1871 all agreements with Indian tribes have been enacted as acts of Congress by passage in both houses and approval by the President. Ratification by the Senate alone is not sufficient.

The allotments in question were made to appellants under authority of the General Allotment Act of 1887 and the Act of March 1, 1907, 19 Stat. at Large 256, Vol. III Kappler on Indian Laws, page 286.

If the appellants have the rights they claim in this action, the rights must be based upon the general Allotment Act of 1887 and the decisions of this court which have already been cited and discussed.

The general allotment act does not provide for any action against the United States, save in section 345. That section not only provides that Indians may sue the United States if officers of the government refuse to make allotments or exclude the Indians from allotments, but it expressly provides that the action may be maintained in the district courts with the Indian as plaintiff and the United States defendant. There is no need to imply consent to sue.

The weakness in counsel's argument about implication of the right to maintain this action is: No Statute provides for a suit against the United States, upon the grounds that a fee patent is void and that other persons have excluded the Indians from the allotments. There is no right of action created and therefore no right to sue the United States can be implied. There is no act of Congress which provides for suits to annul fee simple patents, and therefore consent to sue the United States in such an action can not be implied. We have already shown that the United States should be the plaintiff not a defendant in an action to cancel a fee patent.

If the defendants other than the United States have excluded the appellants from their lands, without right, certainly ejectment can be maintained against such defendants, without joining the United States, if no collateral attack upon the fee simple patents is involved. Plainly such a collateral attack would be involved. In this action the validity of the fee patents is the main and not a collateral issue. In an action for ejectment or to quiet title without the United States as a party, the validity of

the deeds by which defendant claims title would be the main issue. Plaintiffs would have to introduce evidence dehors the patent record to prove that the patents were issued without application or consent or finding of competency, and such evidence can not be introduced in a collateral attack.

CONCLUSION

The complaint fails to state a cause of action for cancellation either of the fee patents or the voluntary conveyances of the plaintiffs or to establish the invalidity of either. The action is one to cancel and annul a fee simple patent and therefore, the plaintiffs can not maintain it because such an action can only be prosecuted by the United States as party plaintiff, and for the further reason that the United States has not consented to be sued as a party defendant. The order of the District Court that the action should be dismissed was right and should be affirmed.

The appellants' counsel says that appellants have requested the attorney general of the United States to commence an action in their behalf and the request was refused. It would seem that this officer believed the claims of the appellants were without merit; otherwise an action would have been commenced in the name of the United States.

Respectfully submitted.

MURRILLS AND FRISBEE
By Lloyd A. Murrills

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J. L. Sherburne and Eula Sherburne,
His Wife.